SABARUDIN NON

v.

PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CRIMINAL APPEAL NOS: A-05-37-2003, A-05-38-2003, A-05-39-2003 & A-05-40-2003]
30 OCTOBER 2004

CRIMINAL PROCEDURE: *Conviction - Accomplice evidence, based on - Whether conviction proper*

EVIDENCE: *Accomplice - Evidence of - Credibility and corroboration - Whether satisfied - Discrepancies - Whether affected admissibility*

EVIDENCE: *Corroboration - Law as to - Whether learned judge correctly directed himself on law*

CRIMINAL LAW: *Penal Code - Section 34 - Common intention - Proof of - Non-presence and non-participation of co-accused at crime scene - Whether s. 34 applicable - Whether evidence showed co-accused acted in concert with others*

EVIDENCE: *Confession - Co-accused confession - Whether trial judge correctly admitted confession - Whether trial judge erred in shifting burden on to co-accused to prove oppression*

The four appellants in these respective appeals were originally charged with one other, PW34 in the court below for the murder of one Hazleza Ishak ('deceased'). The evidence showed that the murder was committed by PW34 and that the 1st and 2nd appellants assisted in the murder. Also, that the murder was committed upon the direction of the 3rd and 4th appellants. PW34 pleaded guilty to a reduced charge of culpable homicide not amounting to murder and was sentenced to 14 years' imprisonment. He then gave evidence for the prosecution against the appellants herein. The 1st and 2nd appellants were then convicted under an amended charge under the first limb of s. 304 read with s. 34 of the Penal Code ('PC'). The 3rd and 4th appellants were also convicted under an amended charge under s. 304 read with ss. 109

and 34 PC. Each of them was sentenced to 20 years' imprisonment. Hence, these appeals. The following issues arose for determination. Firstly, whether the learned judge was correct in finding the evidence of PW34 credible and corroborated. Secondly, whether there was a common intention between the appellants to act in concert under s. 34 PC. Thirdly, whether the non-presence of the 3rd and 4th appellants at the crime scene rendered s. 34 PC inapplicable. Fourthly, whether the learned judge correctly admitted the confession of the 1st appellant.

Held (dismissing the appeals against convictions)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The evidence of an accomplice must be both credible and corroborated. Credibility is a requirement that must be met by all witnesses. Once an accomplice is found to be an unreliable witness, his evidence must be rejected and no question of corroboration can arise. The principles governing evidence that requires corroboration whether as a matter of practice or as a matter of written law are set out by the Court of Appeal in *Lim Guan Eng v. Public Prosecutor*. The learned judge correctly applied those principles. He found PW34 to be a credible witness. Only then did he proceed to the issue of corroboration. Therefore, he correctly directed himself on the law. Further, there was ample material to support the finding of credibility made by the learned judge in favour of PW34. (pp 474 e-f, 475 g-h & 477 b)

[2] The discrepancies in the evidence of PW34 were not of such nature as to demolish the core of PW34's evidence. That core, from beginning to end was that he acted on the direction of the 3rd and 4th appellants to kill the deceased and that he was assisted in his task by the 1st and 2nd appellants. (p 477 g-h)

[3] It was an essential requirement of the law that PW34's evidence must be corroborated on the very axis of the dispute and not on collateral or freely admitted facts. In the case of the 1st and 2nd appellants, the question was whether they were present and participated in a criminal act. That was the very issue that lay at the axis of the dispute. An examination of the evidence showed abundant corroboration on this point. As far as the 3rd and 4th appellants were concerned, the axis of the dispute was whether they instructed PW34 to abduct and kill the deceased. On this issue, there was sufficient corroboration by way of circumstantial evidence. Accordingly, the learned judge was correct in finding that PW34's evidence was credible and corroborated in material particulars. (pp 478 d-e, 479 b & 482 b)

[4] The 1st and 2nd appellants were present and participated in the abduction of the deceased. When the deceased was assaulted and strangled by PW34, they did not lift a finger to save or rescue her. Further, they assisted in the disposal of her body. The facts constituted the most obvious case of the application of s. 34 PC. The said appellants attempted to wash themselves of criminality with a story that did not raise a reasonable doubt in the mind of the learned judge. (p 483 b-c)

[5] Presence in every case is not necessary for s. 34 PC to apply. Section 34 should be interpreted having regard to modern technological advances. The early decisions on the section, admittedly by the Privy Council that held presence to be essential for s. 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would be a perversion of justice if we cling on to an interpretation of the section made at a time when science was at a very early stage of development. In the present case, the evidence showed that the 3rd and 4th appellants acted in concert. By means of the cell phone and other conversations, they were very much constructively present and participated in the abetment of the killing of the deceased. (pp 483 e-f & 484 g)

[6] The defence of innocent association was demolished by the direct and circumstantial evidence presented by the prosecution. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one that arises from a consideration of all the evidence in a fair and reasonable way. Accordingly, the learned judge correctly found that the defence failed to raise a reasonable doubt. (p 485 a-e)

[7] Having regard to the evidence on the voir dire and the brief note of the learned judge's reasons, the confession of the 1st appellant was wrongly admitted. The learned judge shifted the burden onto the 1st appellant to prove that he was oppressed. That was an error. The said confession and all references to it in the record of appeal should be excluded including those areas where the learned judge called it in aid. Nevertheless, there was abundant evidence to support the convictions of the accused persons. An accused's conviction may be upheld if there is other evidence to support it after excluding an inadmissible confession. (p 485 f-h)

*[**Bahasa Malaysia** Translation Of Headnotes*

Keempat-empat perayu dalam rayuan-rayuan di sini pada awalnya dituduh bersama-sama dengan seorang lagi, iaitu SP34, di mahkamah di bawah kerana membunuh seorang Hazleza Ishak ('si mati'). Keterangan menunjukkan bahawa pembunuhan dilakukan oleh SP34 dan dibantu oleh perayu pertama dan kedua. Juga, pembunuhan adalah dilakukan atas arahan perayu ketiga dan keempat. SP34 mengaku bersalah terhadap pertuduhan lebih ringan homisid salah yang bukan membunuh, dan telah dijatuhkan hukuman 14 tahun penjara. Beliau kemudian memberi keterangan bagi pihak pendakwaan terhadap perayu-perayu di sini. Perayu pertama dan kedua kemudian disabitkan atas pertuduhan terpinda di bawah cabang pertama s. 304 dibaca bersama s. 34 Kanun Keseksaan ('KK'). Perayu ketiga dan keempat juga disabitkan atas pertuduhan terpinda di bawah s. 304 dibaca bersama ss. 34 dan 109 KK. Akibatnya adalah rayuan-rayuan di sini. Isu-isu berikut berbangkit untuk pemutusan. Pertama, sama ada yang arif hakim betul dalam mendapati keterangan SP34 sebagai boleh dipercayai dan disokong. Kedua, sama ada terdapat niat bersama di antara perayu-perayu untuk bertindak di bawah s. 34 KK. Ketiga, sama ada ketidakhadiran perayu ketiga dan keempat di tempat kejadian menjadikan s. 34 tidak terpakai. Keempat, sama ada yang arif hakim betul menerima masuk pengakuan salah perayu pertama.

Diputuskan (menolak rayuan-rayuan terhadap sabitan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Keterangan seorang rakan sejenayah mestilah boleh dipercayai serta disokong. Kebolehpercayaan adalah satu syarat yang mesti dipenuhi oleh semua saksi. Sebaik seorang rakan sejenayah didapati tidak boleh dipercayai, keterangannya hendaklah ditolak dan soal sokongan tidak lagi berbangkit. Prinsip keterangan yang memerlukan sokongan, sama ada berkaitan dengan perkara amalan atau undang-undang bertulis, telah dibentang oleh Mahkamah Rayuan dalam *Lim Guan Eng lwn. Public Prosecutor*. Yang arif hakim telah dengan betulnya menggunapakai prinsip ini. Beliau mendapat SP34 sebagai seorang saksi yang boleh dipercayai. Hanya selepas itu beliau pergi kepada isu sokongan. Oleh yang demikian, beliau telah mengarahkan dirinya dengan betul di sisi undang-undang. Selain itu, terdapat banyak alasan lain yang menyokong dapatan yang arif hakim tentang kebolehpercayaan SP34.

[2] Perselisihan dalam keterangan SP34 bukanlah sebegitu rupa hingga memusnahkan asas keterangannya. Asas tersebut, dari awal hingga ke akhir, adalah bahawa beliau bertindak atas arahan perayu-perayu ketiga dan keempat untuk membunuh si mati dan bahawa beliau dibantu dalam perbuatannya itu oleh perayu pertama dan kedua.

[3] Menjadi keperluan utama undang-undang bahawa keterangan SP34 hendaklah disokong atas persoalan pokok dan bukannya mengenai perkara sampingan atau atas fakta-fakta yang diakui. Dalam kes perayu pertama dan kedua, persoalannya adalah sama ada mereka hadir dan mengambil bahagian di dalam satu perbuatan jenayah. Itulah isu yang menjadi persoalan pokok di sini. Keterangan menunjukkan terdapat sokongan kuat atas persoalan ini. Setakat yang melibatkan perayu ketiga dan keempat, persoalan pokoknya adalah sama ada mereka mengarahkan SP34 untuk melarikan dan membunuh si mati. Atas persoalan ini, terdapat sokongan yang mencukupi melalui keterangan ikut keadaan. Yang arif hakim, dengan itu, betul dalam dapatannya bahawa keterangan SP34 adalah boleh dipercayai dan disokong pada butiran-butiran pentingnya.

[4] Perayu pertama dan kedua hadir dan mengambil bahagian dalam melarikan si mati. Apabila si mati dipukul dan dicekik oleh SP34, mereka tidak berbuat apa-apa untuk membantu atau menyelamatkan si mati. Selain itu, mereka membantu membuang mayat si mati. Fakta-fakta ini menjadi alasan jelas untuk pemakaian s. 34 KK. Perayu-perayu ini juga cuba membersihkan diri mereka dari jenayah, tetapi melalui cerita yang tidak dapat membangkitkan keraguan munasabah pada pemikiran yang arif hakim.

[5] Kehadiran dalam setiap kes bukan satu keperluan bagi pemakaian s. 34. Seksyen 34 harus diberikan tafsiran mengikut perkembangan teknologi moden. Keputusan-keputusan terawal mengenai s. 34, seperti yang dibuat oleh Majlis Privi, iaitu bahawa kehadiran adalah perlu untuk pemakaian s. 34, adalah dibuat pada waktu di mana kaedah berkomunikasi tidak secanggih sekarang ini. Adalah bertentangan dengan keadilan jika kita terus berpegang kepada pentafsiran seksyen ini yang dibuat pada masa di mana ilmu sains masih pada tahap perkembangan awal. Dalam kes semasa, keterangan menunjukkan bahawa perayu ketiga dan keempat telah bertindak secara bersesama. Melalui telefon bimbit dan perbincangan lain, mereka sebenarnya hadir secara konstruktif dan mengambil bahagian dan bersubahat membunuh si mati.

[6] Pembelaan pergaulan ikhlas (innocent association) telah dimusnah oleh keterangan langsung dan ikut keadaan yang dikemukakan oleh pendakwaan. Suatu sangkaan kabur atau inferens berkaitan kemungkinan tertuduh tidak bersalah bukanlah suatu keraguan munasabah. Keraguan munasabah adalah sesuatu yang berbangkit dari pertimbangan semua keterangan yang dibuat dengan cara yang adil dan munasabah. Yang arif hakim, dengan itu, betul apabila mendapati pembelaan gagal membangkitkan keraguan munasabah.

[7] Mengambil kira keterangan di atas *voir dire* serta nota ringkas mengenai alasan-alasan yang arif hakim, pengakuan salah perayu pertama telah diterima masuk secara salah. Ini kerana yang arif hakim telah mengalih beban bukti kepada perayu pertama bagi membuktikan bahawa beliau telah ditekan. Itu suatu kesilapan. Pengakuan salah berkenaan dan semua rujukan kepadanya di dalam rekod rayuan harus disingkir termasuk di tempat-tempat di mana yang arif hakim mengambilnya sebagai sokongan. Walaupun begitu, terdapat keterangan yang kuat untuk menyokong pensabitan yang dituduh. Pensabitan seseorang tertuduh boleh dipertahan jika, setelah diketepikan pengakuan salah yang tidak boleh diterima masuk, terdapat keterangan lain yang menyokong pensabitan itu.

Case(s) referred to:
Arts Niche Cyber Distribution v. PP [1999] 4 SLR 111 ***(refd)***
Chao Chong v. PP [1960] MLJ 238 ***(refd)***
Hari Ram v. State of Uttar Pradesh [2004] 3 LRI 523 ***(foll)***
Lee Yew Seng v. PP [1967] 1 MLJ 215 ***(refd)***
Lim Guan Eng v. PP [1998] 3 CLJ 769 CA ***(foll)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(foll)***
Queen-Empress v. Gobardhan ILR 9 All 528 ***(refd)***
R v. Hills [1988] 86 Cr App R 26 ***(refd)***
Suresh v. State of Uttar Pradesh AIR [2001] SC 1344 ***(foll)***
Tan Kin Seng v. PP [1997] 1 SLR 46 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 14
Penal Code, ss. 34, 109, 302, 304

Other source(s) referred to:
Chaudiri's Law of Confession, Approvers and Accomplices, 1999, 7th edn
Sarkar on Evidence, 15th edn, p 99
The Law of Criminal Evidence, 5th edn, vol 1, p 34

(Criminal Appeal No: A-05-37-2003)
For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Azmi Ariffin FC

(Criminal Appeal No: A-05-38-2003)
For the appellant - Dato' Muhammad Shafee Abdullah (Frida Krishnan & M Kirubanandan); M/s Shafee & Co
For the respondent - Azmi Ariffin FC

(Criminal Appeal No: A-05-39-2003)
For the appellant - A Tanasekharan (N Ahilan); M/s A Thanasekharan & Co
For the respondent - Azmi Ariffin FC

(Criminal Appeal No: A-05-40-2003)
For the appellant - A Tanasekharan (N Ahilan); M/s A Thanasekharan & Co
For the respondent - Azmi Ariffin FC

[Appeal from High Court, Taiping; Criminal Trial Nos: 45-5-2002; 45-6-2002]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

Preliminary

Hasleza Ishak was 26 years old when she died. She was cut down in the prime of her life. This case concerns the circumstances in which she met her end. The four accused who stand before us as appellants were originally charged with one other, the first accused in the court below for her murder. We will for convenience refer to the appellants as the second, third and fourth and fifth accused respectively. The charges against them were as follows. First, as against the 1st accused (Mat Saad bin Mat Isa), the 2nd and 3rd accused, under s. 302 of the Penal Code read with s. 34 of that Code. Second, as against the 4th and 5th accused, under s. 302 of the Penal Code read with s. 109 of that Code. It is appropriate to mention that at after the trial had commenced and after PW25, the pathologist had given his evidence, the first accused pleaded guilty to a reduced charge of culpable homicide not amounting to murder. He was dealt with and sentenced to 14 years imprisonment. He then gave evidence for the prosecution as PW34. At the close of the case for the prosecution, the learned trial judge ruled that the prosecution had made out a case for the appellants to answer. However, at the close of the whole case, that is to say, after hearing the defence and their witnesses, the learned trial judge amended the charges as follows. As against the 2nd and 3rd accused, a charge under the first limb of s. 304 read with s. 34 of the Penal Code was preferred. As against the 4th and 5th accused, the learned judge amended the charge to one under s. 304 of the Penal Code read with ss. 109 and 34 of the Penal Code. The learned judge then proceeded to convict each of the accused on the amended charge and sentenced each of them to 20 years imprisonment. We note that there is no cross appeal by the Public Prosecutor against the learned judge's decision to convict on the lesser charge.

Issues And Arguments

From the prosecution's point of view, this is a simple and straightforward case. It is common ground that this case turns almost entirely on the evidence of PW34. The evidence of that witness in a nutshell is that he was recruited by the 4th and 5th accused to kill the deceased. He obtained the assistance of

the 2nd and 3rd accused for that purpose. Late in the evening of 6 October 2002, PW34, the 1st and 2nd accused abducted Hasleza, whom we will hereafter refer to as "the deceased". After the abduction, the deceased was taken to another place some distance away where PW34 delivered a "karate chop" or blow to the neck of the deceased to silence her. The deceased was then bundled into the 2nd accused's car and taken to a bridge where she was cast into a ravine. She was already dead by then. According to the medical evidence, death was caused by asphyxiation, that is to say, pressure being applied to the front of the neck. In other words, the deceased probably died of suffocation through manual strangulation. It is a point to note that throughout the entire episode, that is to say, from the moment of the deceased's abduction up to and after her body had been disposed of, the 2nd accused drove his car which was used to transport the deceased, both when she was alive and after she had died. For completeness we would add that sometime later, the accused were arrested and charged as aforesaid.

Before us the appeal was argued on three main grounds. First, that the learned judge did not judicially appreciate or evaluate the evidence of PW34. Second, that the confession of the 2nd accused had been wrongly admitted and used. Third, that the learned judge had, in so far as the 4th and 5th accused are concerned, failed to give due consideration to the defence of these accused persons. We will deal with these complaints in a format that we find convenient.

Appreciation Of PW34's Evidence

(i) The Relevant Test

There is no dispute that PW34 is an accomplice. The learned trial judge certainly appreciated this. In his judgment he castigated PW34 in the strongest of terms. This is hardly surprising. After all, it was PW34 who killed the deceased. There are passages in the judgment of the learned judge referring to the test to be applied to determine who an accomplice is. Some of these passages are quite open to the interpretation that only participes criminis are accomplices. With respect, although the question is entirely academic on the facts of this case in view of the prosecution's concession that PW34 was an accomplice, we think it necessary to clarify the point for future cases. In our judgment, the correct test for determining whether a witness is an accomplice is that laid down by Thomson CJ in *Chao Chong v. Public Prosecutor* [1960] MLJ 238:

> The true question, however, was not the technical one of whether the witness could have been convicted for his participation in the offence if he had been prosecuted. The true question was whether, having regard to his participation in the offence and having regard to all the circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted.

We now return to the mainstream. It is true, as Mr Gurbachan Singh of counsel for the 4th accused pointed out, that PW34 was a self-confessed liar. The witness openly admitted that. True again that there are some contradictions in the evidence of this witness. All these are matters eminently for the learned trial judge to address and take into account. And the question at the end of the day for the learned trial judge, and not for us, to decide was whether PW34 was telling the truth about the role played by the other accused in the commission of this heinous crime. Of course, if the learned judge did not judicially appreciate the evidence of this witness as contended by learned counsel Mr. Gurbachan Singh, then, of course, we will be duty bound to intervene.

Now, in the judicial appreciation of the evidence of an accomplice there is a special rule for the guidance of the court. It is this. The evidence of an accomplice must be both credible and be corroborated. The first element, namely, credibility, is a requirement that must be met by all witnesses. The second is peculiar to an accomplice. Once an accomplice is found by a trial court to be an unreliable witness, then his evidence must be rejected and no question of corroboration can arise. This Court in *Lim Guan Eng v. Public Prosecutor* [1998] 3 CLJ 769 set out the principles governing evidence that requires corroboration whether as a matter of practice or as a matter of written law as follows:

> So far as the law governing corroboration is concerned, we accept the following propositions to be well settled and beyond controversy:
>
> (1) As a general rule, the conviction of an accused may proceed upon the uncorroborated evidence of one witness.
>
> (2) There are cases where either common law – as a matter of practice which has, through passage of time, acquired the force of law – or statute, creates an exception to the general rule in respect of certain categories of witnesses by calling for, or indeed demanding, that their evidence may not to be acted upon in the absence of independent corroboration. Accomplices illustrate the common law exception, while s. 6(1) illustrates the statutory exception.
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> (3) Evidence that requires corroboration, whether as a matter of practice having the force of law or by direction of statute:

(a) must first be capable of belief before any question of corroboration may arise, for evidence that falls of its own inanition cannot be saved by the presence of abundant corroboration;

(b) cannot corroborate itself, for tainted evidence does not remove its taint by repetition, notwithstanding s 157 of the Evidence Act 1950; and

(c) cannot be corroborated by evidence that itself requires corroboration.

(4) To constitute true corroboration in the eyes of the law, the corroborative evidence must:

(a) be capable of belief;

(b) be independent in the sense mentioned in proposition (3)(c) above;

(c) be in respect of the fact or facts that lie at the axis of the dispute, that is to say, upon the fact in issue and not upon some collateral matter or upon a fact in respect of which there is no quarrel. In other words, it must be corroboration upon a material particular but need not be identically repetitive of the evidence that requires corroboration.

(5) At common law, a trial court is entitled to act upon uncorroborated evidence which in itself requires corroboration provided that it warns itself of the danger of so acting. The warning must not amount to mere lip-service. Good reasons must be furnished for departing from the accepted rule. Departure from the normal rule may be justified where the evidence requiring corroboration emanates from a witness who is a person of high character and the offence is one that does not carry with it any serious moral stigma.

The authorities that support these propositions are legion and include *R v. Baskerville* [1916] 2 KB 658, *Chao Chong v. Public Prosecutor* [1960] MLJ 238, *Teng Ser Siong v. Public Prosecutor* [1963] MLJ 265, *TN Nathan v. Public Prosecutor* [1978] 1 MLJ 134, *Jegathesan v. Public Prosecutor* [1980] 1 MLJ 165, *Dowse v. Attorney General, Federation of Malaya* [1961] MLJ 249, *Bhuboni Sahu v. King Emperor* AIR [1949] PC 257, *Mohamed Ali v. Public Prosecutor* [1962] MLJ 230, *Yap Ee Kong & Anor v. Public Prosecutor* [1981] 1 MLJ 144, *Public Prosecutor v. Paneerselvan & Ors* [1991] 1 MLJ 106 and more recently *Public Prosecutor v. Thavananthan* [1994] 2 MLJ 436.

A reading of the learned judge's judgment reveals that he was most conscious about the principles in the above-quoted passage and applied them. In his grounds of judgment the learned judge found PW34 to be a credible witness. Only then did he proceed to the issue of corroboration. In our judgment he correctly directed himself on the law.

(ii) The Issue Of Credibility

Based on the submissions of counsel before us the question is whether the learned judge properly evaluated PW34's evidence. In holding PW34 to be a credible witness the learned judge took into account the whole of that witness' evidence and tested it against the probabilities of the case. We find this approach to accord with the general principles that courts have laid down for themselves in the judicial appreciation of oral evidence. Thus, in *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110 where Raja Azlan Shah FJ said that:

> a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection …

On the methodology of assessing a witness' evidence we can do no better than to cite the following passage from *Sarkar on Evidence* (15th edn) p. 99:

> The Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor is any such rule possible for the proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. 'For weighing evidence and drawing inferences from it, there can be no canon. *Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts in this country discharging the functions of a jury in England, has to weigh and decide'* (per Birch J, in *R v. Madhub,* 21 WR Cr 13, 19; *Mahendrapal v. State,* AIR [1955] A 238 …
>
> Neither the Evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. The question depends upon so many circumstances that it is impossible to lay down hard and fast rules. The law has left it to the court to decide whether the evidence should be believed or not and, if believed, what weight should be attached to it or what effect should be given to it. *These matters have been left at the sound discretion of the court. When the Legislature itself has left them at the discretion of the court, it is not open to the highest court to fetter the discretion by laying down hard and fast rules, because it would be tantamount to legislating* (*Jwala v. State,* AIR [1963] All 161 FB). (emphasis added.)

In *Chaudiri's Law of Confession, Approvers and Accomplices* (7th edn., 1999) which is the leading text on the subject, the learned author states as follows:

> Whether the evidence of the approver in any given case may be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self- exculpatory and so on and so forth.

Based on the foregoing authorities, we are unable to find any misdirection on the part of the learned judge. Further, having carefully scrutinised the evidence led by the prosecution, we are satisfied that there is ample material to support the finding of credibility made by the learned judge in favour of PW34. We find it unnecessary to set out all of them here. Suffice that we mention some items of evidence which illustrate the correctness of the learned judge's finding on the issue of PW34's credibility. First, PW34 testified that he had broken the deceased's car window with a blow of his fist. The police examination of the deceased's car revealed this to be the case. Second, he testified that he, together with the 2nd and 3rd accused threw the body of the deceased into a ravine. A few days after the deceased was killed, her body was indeed found at the bottom of a ravine. Third, he said that the body of the deceased had been placed on the rear seat of the 2nd accused's car. A forensic examination of the car in question confirmed this. Fourth, PW34 was not a self serving and exculpatory accomplice as he fully implicated himself and made a clean breast of his own illegal acts. He readily admitted his frailties when confronted with them. He appears to have withstood the pressured strain of searching cross-examination by experienced counsel.

There is this further consideration. The learned trial judge who had the singular advantage of observing and hearing PW34 for several days in the witness box accepted him as a witness of truth. Even putting to one side all observations as to demeanour, we are entirely in agreement with the learned judge's finding that PW34 is a credible witness and would accordingly affirm his finding in that regard. Indeed, we have taken the additional precaution of reading and re-reading PW34's evidence and find his story entirely credible having regard to all the surrounding circumstances of this case.

Our attention was drawn both by Mr Gurbachan Singh for the 4th accused and Dato' Muhammad Shafee of counsel for the 5th accused to several discrepancies in the evidence of PW34. We are indeed grateful to both counsel for having taken us through the printed evidence with a fine-tooth comb both in oral submissions and in their written summary. However, we are not convinced that the discrepancies are of such a nature as to demolish the core of PW34's evidence. And that core, from beginning to end, was that he acted on the direction of the 4th and 5th accused to kill the deceased and that he was assisted in his task by the 2nd and 3rd accused.

On this part of the case we would once again quote from *Sarkar on Evidence*, at p. 109:

> Discrepancies do not necessarily demolish testimony (*Narotam v. State*, AIR [1978] SC 1542). Discrepancies in the testimony of various witnesses on material or broad points have to be carefully weighed in arriving at the truth. But trifling discrepancies should be ignored, as they are often a test of truth. Several persons giving their versions of a transaction witnessed by them are naturally liable to disagree on immaterial points. Their powers of observation, expression or memory are not the same and honest differences are easily possible. It must be remembered that there are discrepancies of truth as well as falsehood. It is the broad facts of a case and not the little details that are to be considered in weighing evidence.

(iii) Corroboration

(A) As Against The 2nd And 3rd Accused

The next issue is whether PW34's evidence was corroborated in material particulars. We emphasise that it is an essential requirement of the law that PW34's evidence must be corroborated on the very axis of the dispute and not on collateral or freely admitted facts. With this in mind let us now consider the case of the 2nd and 3rd accused. The question here is whether they were present and participated in a criminal act. That is the issue which lies at the axis of the dispute. An examination of the evidence shows abundant corroboration on this point. Again we find it unnecessary to go through all the items of evidence. Suffice that we mention three matters. First is the fact of their admitted presence at the scene of the deceased's abduction, at the place where she was done unto death and the scene at which her body was disposed of. Second, as observed earlier there is the fact that it was the 2nd accused who used his car and acted as driver throughout the whole episode. Third, there is the evidence of the act of the second accused absconding when he saw the police about his home. It is trite that the act of an accused absconding may amount to corroboration, although it may, standing by itself, be a very weak corroborating element. As observed by the court in *Queen-Empress v. Gobardhan* ILR 9 All 528:

> As to the fact that Gobardhan was a party to the murder, the only corroboration of Mahasukha's evidence which I find, taking the view of the whole of the evidence which I do, is afforded by Gobardhan himself. He, absconded and remained away until he was arrested seven months after Nehal Singh's death. Gobardhan and his witnesses gave a false account as to the time when he left his village, and he has never given any other. This, I think, is some corroboration of Mahasukha's evidence that Gobardhan was a party to the murder, and is sufficient for us to act upon.

In the present instance, the act of the 2nd accused absconding does not stand alone. There are the other facts to which we have already referred. Accordingly, on the facts of this case, the fact that the 2nd accused went into hiding is a strong circumstance against him that corroborates PW34's evidence.

(B) As Against The 4th & 5th Accused

The axis of the dispute so far as the case of the 4th and 5th accused is concerned is whether they instructed PW34 to abduct and kill the deceased. On this issue we find sufficient corroboration by way of circumstantial evidence. First, there is the evidence of PW 6 who witnessed the abduction of the deceased. Learned counsel for the 5th accused concedes this corroborates PW34's version. Second, there is the evidence of the phone calls made by PW34 to the 4th accused and those made by the 4th accused to the 5th accused at the material time as well as calls made by the 5th accused to the 4th accused and by the 4th accused to PW34 led through PW52 and PW54. The first of these was made by PW34 on the 2nd accused's cellphone on 6 October 2002 at about 6pm. It was made to the 4th accused's cell-phone. It is common ground that this was after the deceased had been abducted and brought elsewhere. PW34's evidence was that he informed the 4th accused by means of this call that the deceased was in his power. He asked the 4th accused what he was to do with her: whether she was to be sent to the 4th accused's home or whether the 4th accused wished to send her to the 5th accused's home. According to PW34, he was told by the 4th accused to dispose of the deceased as already instructed by the 5th accused. The next phone call was made by PW34, again using the 2nd accused's cell-phone. It was made on 6 October 2002 at about 11pm. By this time the deceased's body had already been cast into the ravine.

There is also evidence to show that between the hours of 6pm on 6 October 2002 and 7 October 2002, several attempts were made by PW34 to reach the 4th accused. This is reflected in the evidence of PW52 and PW54. We accept the submission of learned counsel for the 4th and 5th accused that each of these calls lasted only a few seconds thereby indicating that these were all failed attempts. But the point made by the prosecution – and it is a most valid point – is that these calls go to show the state of mind of PW34 during the material period of time. They are admissible by virtue of s. 14 of the Evidence Act 1950. They go to show that PW34 was desperately trying to reach the 4th accused.

Now, what are the relevant inferences that the circumstances here admit? PW34 had the deceased under his control when he telephoned the 4th accused at about 6pm. He either telephoned the 4th accused for a wholly innocent purpose (as contended by the defence) or to ask for instructions. Given the totality of

the circumstances, it is, in our judgment, entirely improbable that PW34 telephoned the 4th accused for an innocent purpose. It is inconceivable, given the totality of the evidence that PW34 would not have mentioned to the 4th accused that he (PW34) had the deceased under his control.

20. Take now the second call on 6 October 2002 made at about 11pm. As already noted, this was again made using the cell-phone of the 2nd accused. It was made to the 4th accused's home. According to PW34, he informed the 4th accused that the deceased whom 4th accused had wanted killed had been disposed of. The defence contends that this conversation was again entirely innocent. But we consider, having regard to the totality of the evidence that the more probable inference is that the conversation was as described by PW34. It is beyond imagination that having got rid of the deceased PW34 would not have mentioned her at all during the telephone conversation.

There is an additional feature in this case which strongly supports the prosecution as to the probable contents of the aforesaid telephone conversations. As we have earlier observed, PW34 was desperately trying to reach the 4th accused at various times during the whole of the episode in question. Why would he do that unless he wanted to communicate to the 4th accused the *status quo* prevailing from time to time as events developed? This goes to support the conclusion that PW34 was not taking matters into his own hand but was seeking the 4th accused's directions from time to time. Further, there is evidence that after receiving PW34's call at about 6pm, the 4th accused immediately attempted to call the 5th accused on his cell-phone. That call failed. Thereafter he called the 5th accused's house and the evidence shows that that call lasted for about 1 minute 25 seconds. There is also evidence that at about 11pm on 6 October 2002, after receiving PW34's call, the 4th accused contemporaneously made a call to the 5th accused and almost immediately after that called PW34. This, in our judgment shows complicity on the part of the 4th and 5th accused. That is the obvious and the only reasonable inference to be drawn from the facts. It is therefore hardly surprising that the learned trial judge rejected the suggestion that the telephone conversations in question were entirely innocent.

The next piece of circumstantial evidence is provided by the 4th and 5th accused themselves. It is important to recall their version of the story. According to them, PW34 had been engaged to exorcise the "santau" or spirit which had plagued the Raja Perempuan Muda and with which the deceased had something to do. It is common ground that the 5th accused led the 4th accused and PW34 (who travelled together in the 4th accused's car) to show the deceased's house to perform the rituals that would rid the Raja Perempuan

Muda of the evil spirit. In other words, showing the location of the deceased's house was for an entirely innocent purpose. However, according to PW34, it was to identify to him the house of the person he was meant to kill. Now, when the 4th accused gave evidence he agreed under cross-examination by the learned deputy that it was unnecessary to visit a person's home if one wanted to exorcise "the santau" or evil spirit. That concession puts paid to the defence suggestion that the drive to locate the deceased's house was for an innocent purpose.

As for the 5th accused, there were phone calls made to him by the 4th accused on the evening of 6 October 2002 and in the early hours of 7 October 2002. The phone calls were made contemporaneously with the calls received by the 4th accused from PW34. These calls, in our judgment strongly support the inference that the 4th accused was keeping the 5th accused abreast of the goings on as reported to him by PW34.

We therefore agree with the following direction by the learned judge on this part of the case:

> In my view after considering their conversations which are especially within their knowledge, the time and timing of their calls and communication and the totality of the evidence for the prosecution, I find the communication between the 3 above persons in the itemised bill constitute corroboration of Saad's testimony.

That circumstantial evidence may provide corroboration is established by *R v. Hills* [1988] 86 Cr App R 26, where the court held as follows:

> Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove (1) by medical evidence that she had had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts. None of these items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence.

In *Tang Kin Seng v. Public Prosecutor* [1997] 1 SLR 46, Yong Pung How CJ, Singapore, whose views this court treats with great respect, described the foregoing passage in *Hills* as follows:

> This is but common sense. The only surprise is that it took so long for it to be recognised. If a conviction for an offence can be secured solely on circumstantial evidence, there is no reason at all why corroboration cannot also be based purely on circumstantial evidence. The contrary position would lead to the absurdity that the prosecution's case is stronger if the victim is unable to give evidence.

To sum up this part of the case, we find ourselves entirely in agreement with the learned judge's finding that PW34's evidence is credible and corroborated in material particulars. With that we now turn to deal with the liability of the accused under s. 34 of the Penal Code.

Common Intention Of 2nd & 3rd Accused

To deal with the criminal liability of the 2nd and 3rd accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s. 34. In *Suresh v. State of Uttar Pradesh* AIR [2001] SC 1344, Sethi J speaking for himself and Agrawal J said:

> Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. *Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.* (emphasis added.)

In *Hari Ram v. State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:

> Under the provisions of s. 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s. 34, when an accused is convicted under s. 302 read with s. 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was

taken by each of them. As was observed in *Ch Pulla Reddy & Ors v. State of Andhra Pradesh* AIR [1993] SC 1899, s. 34 is applicable even if no injury has been caused by the particular accused himself. For applying s. 34 it is not necessary to show some overt act on the part of the accused.

Applying these principles to the facts of the 2nd and 3rd accused's case it may be seen, as already mentioned, that these two accused were present and participated in the abduction of the deceased. When the deceased was then removed to another place and assaulted by PW34 and strangled by him, neither the 2nd nor the 3rd accused lifted a finger to save or to rescue her. Further, they assisted in the disposal of the body of their unfortunate victim. In our judgment the facts of the present instance constitute the most obvious case – a textbook example – of the application of s. 34. These two accused attempted to wash themselves of criminality with a story which did not raise a reasonable doubt in the mind of the learned trial judge. That is the same view we entertain after a careful reading of the appeal record.

Common Intention Of The 4th & 5th Accused

The main point made and emphasised by both learned counsel for the 4th and 5th accused is that there must be presence and participation for s. 34 to bite. They argue that since neither of their clients was present at either the scene of the abduction nor at the place where the deceased was done unto death, nor at the scene where her body was cast into the ravine s. 34 has no application to the 4th and 5th accused. With respect, as a matter of law, we are unable to agree with this submission. In our judgment, presence in every case is not necessary for s. 34 to apply. In our judgment, s. 34 should be interpreted having regard to modern technological advances. The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for s. 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an interpretation of the section made at a time when science was at a very early stage of development. We find support for our view from the judgment of Thomas J in *Suresh v. State of Uttar Pradesh*, where his lordship said:

Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract s. 34, eg the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention,

overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why s. 34 cannot apply in the case of those two persons indicated in the illustrations.

Thus to attract s. 34 IPC two postulates are indispensable; (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

Looking at the first postulate pointed out above, **the accused who is to be fastened with liability on the strength of s. 34 IPC should have done some act which has nexus with the offence**. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of s. 32 IPC. So the act mentioned in s. 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, eg a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, s. 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of s. 34 IPC. (Emphasis added.)

So too here. The 4th & 5th accused were, on the evidence already rehearsed, acting in concert. By means of the cell-phone and other conversations, they were very much constructively present and participated in the abetment of the killing of the deceased. We may add that there is no quarrel by the defence that on the evidence, if accepted, there was abetment. There was no submission made that the elements of abetment were not made out as a matter of law. We therefore find it unnecessary to discuss the law upon that subject.

Consideration Of The Defence

We find no merit in the submission of learned counsel for all accused that there was insufficient consideration of their defence. As already demonstrated, while discussing the evidence of PW34 with which the defence case is intertwined, the defence of innocent association was demolished by the direct and circumstantial evidence presented by the prosecution. The learned judge found that the defence did not raise a reasonable doubt in his mind. We agree with his conclusion on this point.

As to what is meant by "reasonable doubt" we would refer to Underhill's treatise on *The Law of Criminal Evidence* (5th edn, vol 1, at p 34) where the learned author states as follows:

> The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. *A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way.* There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in their minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt. (emphasis added.)

In our judgment, the learned judge's direction unto himself amply met the requirements suggested by the learned author in the aforesaid passage with which we wholly agree. It is only after a careful analysis of the evidence that he came to the conclusion that the accused had not raised a reasonable doubt.

Confession Of The 2nd Accused

We need only be very brief on this point. In our view, having regard to the evidence on the voir dire and the brief note of the learned judge's reasons, the confession of the 2nd accused was wrongly admitted. It would appear that the learned judge had shifted the burden onto the 2nd accused to prove that he had been oppressed. That in our view is an error. We have therefore excluded from our minds the confession and all references to it in the record of appeal, including those areas where the learned judge called it in aid.

Nevertheless, we find abundant evidence to support the convictions of the accused persons. It is settled law that an accused's conviction may be upheld if there is other evidence to support it after excluding an inadmissible confession. See, *Lee Yew Seng v. Public Prosecutor* [1967] 1 MLJ 215.

Conclusion

These appeals are, at the end of the day against findings of fact made by the learned judge which are based on the credibility of witnesses seen and heard by him. The approach that we should take to such a case as the present was stated by Yong Pung How CJ, Singapore in *Arts Niche Cyber Distribution v. Public Prosecutor* [1999] 4 SLR 111, a case cited in several subsequent decisions. His Honour there said:

> It is trite law that an appellate court will not interfere with a trial judge's findings of fact unless they are plainly wrong (*Lim Ah Poh v. PP* [1992] 1 SLR 713). As I observed in *PP v. Azman bin Abdullah* [1998] 2 SLR 704:
>
> > [i]t is well-settled law that in any appeal against a finding of fact, an appellate court will generally defer to the conclusion of the trial judge who has had the opportunity to see and assess the credibility of the witnesses. An appellate court, if it wishes to reverse the trial judge's decision, must not merely entertain doubts whether the decision is right but must be convinced that it is wrong …
>
> Where the trial judge's findings of fact are based on his assessment of the witnesses' veracity and credibility, the appellate court will be even more reluctant to overturn his findings: *Yap Giau Beng Terence v. PP* [1998] 3 SLR 656.

Before we conclude, we must commend all police officers who were in conduct of the investigation in this case. The speed with which they acted, the thoroughness of their investigation and their courage in conducting the investigation is truly remarkable. But for their timely action and careful investigation this crime may never have been discovered and the accused brought to justice. Likewise, we would commend the learned deputy who conducted the trial in the court below for the way in which he presented the evidence, given the narrow corridor within which he had to work, and his cross-examination of the accused persons.

For the reasons already the appeals against convictions are dismissed. We will now hear arguments on sentence.